CHAPTER 4

THE IMPACT OF COMPETITION LAW ON THE PRIVATE LAW CONCEPTS OF NULLITY AND DAMAGES

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1. INTRODUCTION

Competition law and contract law have been traditionally regarded as independent areas, with limited interactions. While sharing some common objectives and functions such as promoting economic freedom, the two areas fulfil different roles in regulating commercial activity and the behaviour of market actors.[1] However, in practice EU competition law seems to have an increasingly major impact on private law, as a number of key cases of the Court of Justice of the European Union ('Court of Justice') have indicated.[2] This influence may sometimes conflict with national principles, creating tensions which are in turn stimulating new legal developments.

This chapter analyses the intersections between EU competition law and contract law, focusing mainly on Article 101 of the Treaty on the Functioning of the European Union (TFEU), which has a private law dimension and can directly affect the validity of anti-competitive agreements. A number of key competition law cases will be assessed to explore how recent court rulings have influenced and shaped private law concepts, such as nullity of unlawful contracts, damages and the protection of the weaker contractual party.

This chapter first examines cases where the court clarified the notion of contractual nullity in competition law disputes. While nullity is an important remedy in competition law, a comprehensive analysis of its influence on national law, which takes into account the intricate relationship between effective competition and contractual freedom, is still lacking.[3] This chapter aims to shed some light on this issue, assessing the concept of nullity developed by the Court of Justice and its effects on national law.

A second topic treated in this chapter is the right to claim damages and the principle of effective protection in EU case law. Particular attention will be given to the multi-party dimension in the seminal *Courage* and *Manfredi* cases and the impact of these cases on national law, assessing new legislative developments.

The chapter concludes by arguing that the Court of Justice has actively shaped the concepts of nullity and damages in competition law disputes, leaving it to Member States to determine the consequences of unlawful contracts within the realm of Article 101 TFEU. As a result, the effects of invalid contracts differ considerably depending on the jurisdiction and the particular circumstances of the case. This may mean that clearer guidelines will be needed at the EU level, to ensure legal certainty for contractual parties and for third parties. With regard to damages actions, the Court of Justice has recognised the right to compensation of private parties as an important element in strengthening the functioning of EU competition law. In practice, however, this seems to have limited impact at the national level, due partly to procedural

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[1] See K CSERES, 'Competition and Contract Law' in AS HARTKAMP ET AL (eds), *Towards a European Civil Code*, Kluwer Law International, The Hague 2011, p 205 et seq.

[2] See eg, Case C-453/99, *Courage Ltd v Crehan*, ECLI:EU:C:2001:465; see also B RODGER, 'The Interface Between Competition Law and Private Law: Article 81, Illegality and Unjustified Enrichment' (2002) 6 *Edinburgh Law Review (Edin L Rev)* 217; AS HARTKAMP, 'The Influence of Primary European Law on Private Law' in AS HARTKAMP ET AL (eds), *Towards a European Civil Code*, Kluwer Law International, The Hague 2011, p 127 et seq.

[3] See eg, A LAMADRID DE PABLO and L ORTIZ BLANCO, *Nullity/Voidness: An Overview of EU and National Case Law*, e-Competitions, No 49199.

differences. To address these limitations, the EU has recently adopted new measures to facilitate collective redress and damages actions in the Member States.

2. CONCEPT AND EFFECT OF NULLITY

Article 101(1) TFEU prohibits agreements between undertakings 'which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'. These agreements are automatically void according to Article 101(2) TFEU, except if an agreement 'contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit' (Article 101(3) TFEU).

The Court of Justice recognised in *BRT* that Article 85(1) of the EEC Treaty (now Article 101(1) TFEU) produces direct effects in relations between individuals. This means that this provision creates 'direct rights in respect of the individuals concerned which the national courts must safeguard'.[4] The Court confirmed this concept in subsequent cases such as *Delimitis*, where it reiterated that the aforementioned provisions have direct effect in relations between individuals.[5] In addition, the Court affirmed in the *Bilger* case[6] that 'the power to apply Article 85(1) necessarily implies the power to apply paragraph (2) of that article', which renders contracts in breach of competition law void.[7]

Contract nullity in Article 101(2) is thus a key remedy in competition law, which can be used in contractual litigation either as a 'shield' before the court against a claimant that aims to enforce an unlawful agreement ('Euro-defense'), or as a 'sword', requesting the court to declare an anticompetitive agreement void.[8] As will be seen later in the case law, anyone can invoke the sanction of nullity of an unlawful agreement infringing Article 101 TFEU. In practice, parties have often used the competition law defence as a shield to avoid their contractual obligations in civil law procedures at national level.[9]

The Court of Justice has dealt with the notion and effect of nullity in a series of competition law cases, which helped to shape the concept of contract nullity at EU level, leaving its application generally to Member States' courts. In practice, the sanction of nullity played a particularly significant role in cases regarding vertical agreements, such as in disputes between suppliers and distributors of beers, as in the seminal *Courage* case discussed later in this chapter.[10]

The following sections explore how the court has developed the concept of nullity in key cases, looking at how nullity can affect both the parties to anti-competitive agreements and third parties. Particular issues that will be analysed are: partial contractual nullity, retroactive and automatic effects of nullity, and consequences that invalid contracts may have on third parties.

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[4] Case C-127-73, *Belgische Radio en Televisie v SV SABAM and NV Fonior*, ECLI:EU:C:1974:25, para 16.

[5] Case C-234/89, *Stergios Delimitis v Henninger Bräu AG*, ECLI:EU:C:1991:91, paras 45–46. See also Case C-282/95 *P*, *Guérin automobiles v Commission*, ECLI:EU:C:1997:159, para 39.

[6] Case C-43/69, *Bilger v Jehle*, ECLI:EU:C:1970:20, para 9.

[7] See C QUIGLEY, *European Community Contract Law*, vol 1, *The Effect of EC Legislation on Contractual Rights, Obligations and Remedies*, Kluwer Law International, London 1997, pp 52–53.

[8] See A DI GIO, 'Contract and Restitution Law and the Private Enforcement of EC Competition Law' (2009) 2 *World Competition (WC)* 201.

[9] V. ROSE and D. BAILEY, *Bellamy and Child, European Union Law of Competition,* 7th ed, OUP, Oxford 2014, p 1233 et seq.

[10] Case C-453/99, *Courage v Crehan*, above n 2,explored later in this chapter; another example is Case C-234/89, *Stergios Delimitis v Henninger Bräu*, above n 5, which concerned a dispute between a licensee of a public house and a brewery regarding an exclusive supply agreement. The Court held that Art 85(1) EC (now Art 101(1) TFEU) has a direct effect that needs to be respected by national courts, which have to declare the agreement void if an exemption does not apply.

2.1. NULLITY AS AN EU LAW CONCEPT AND SEVERANCE

Nullity is an EU law concept, which has to be interpreted with reference to its purpose in Community law. The EU nature of the concept was clarified in the seminal *Société Technique Minière* case, in which the Court of Justice also dealt with the issue of severance, holding that nullity can apply to particular clauses in a contract, rather than affecting the whole agreement.[11]

This case concerned a dispute between Technique Minière, a French company which sold public works equipment, and the German undertaking Maschinenbau Ulm, a producer of equipment, and regarded the validity of an 'export agreement'.

Under the terms of the agreement, Maschinenbau provided Technique Minière with the exclusive right to sell a certain number of graders in French territory. In return, the latter promised to refrain from selling competitors' products in France without the consent of Maschinenbau. Subsequently, Maschinenbau brought an action against Technique Minière before the Tribunal de Commerce in France, which decided that the unexecuted part of the agreement was annulled and Technique Minière should bear the liability. Technique Minière appealed this decision, requesting the Cour d'Appel of Paris to declare that the agreement was 'absolutely void', because it was contrary to EU competition law. In turn, Maschinenbau maintained that only an exclusive dealing agreement which completely 'divides up' the market could come within the scope of Article 85 EEC (now Article 101 TFEU). Instead, in the specific case, competition could still take place in France, both by means of parallel imports and because Technique Minière could export the graders in question. The French court referred the case to the Court of Justice to clarify the extent and interpretation of Article 85(2) EEC, asking in particular if the nullity under this provision would affect the whole agreement containing a prohibited clause or the prohibited clause alone.

The Court of Justice affirmed that this provision should only be interpreted with reference to its purpose in Community law and thus had to be limited to this context. Furthermore, it held that '(t)he automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently, any other contractual provisions which are not affected by the prohibition and which therefore do not involve the application of the Treaty, fall outside Community law.'[12]

The importance of this case lies in its establishment of nullity as an EU law concept, which needs to be applied with reference to its function in Community law, and which is only applicable to the prohibited parts of the agreements that infringe Community law.

In the subsequent *Cement* case, the Court of Justice confirmed the principle of severance, holding that the automatic nullity according to Article 85(2) applies only to those contractual provisions which are incompatible with Community law.[13] Furthermore, it clarified that the effects of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, are to be determined by the national courts according to their own law.[14]

As a result, the severance principle has been applied in different ways depending on the jurisdiction and the specific circumstances of the case. While in some cases the national courts have decided that nullity should be limited to particular clauses of an agreement,[15] in others they found that the anti-competitive clause was essential to the agreement, which was

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[11] Case C-56/65, *Société Technique Minière (LTM) v Maschinenbau Ulm GmbH (MBU)*, ECLI:EU:C:1966:38.

[12] Ibid.

[13] Case C-319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH & Co KG*, ECLI:EU:C:1983:374.

[14] Ibid.

[15] For example in Germany, the Higher Regional Court of Düsseldorf decided to annul only an exclusive purchase obligation, confirming the validity of the remaining contract. *Body Shop*, VI-U (Kart) 13/06, Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf), 14.04.2007; see M KLASSE, 'A German Court Finds an Exclusive Purchase Obligation in Breach of Art. 81 EC and Replaces a Void Non-Compete Obligation in a Franchise Agreement (*The Body Shop*)', e-Competitions, No 13965,14.04.2007.

therefore entirely void.[16] The application of the severance principle in specific Member States will be analysed in more detail in the section below.

2.2. SEVERANCE AT THE NATIONAL LEVEL

In Germany, partial nullity is explicitly mentioned in section 139 of the German Civil Code (BGB), which establishes a presumption of complete nullity of a contract unless it can be assumed that the parties would have agreed to the transaction even without the void part.[17] Thus, if a contractual clause can be separated from the main agreement, the intentions of the contractual parties play a central role in determining the validity of the remaining contract.

A related question in relation to partial nullity is whether the national court can 'reduce' or adjust an excessive contractual clause, so that it becomes compliant with competition law. According to German literature, different opinions exist regarding the conformity of this approach with EU law.[18] According to some authors, a 'reduction' would comply with Article 101 TFEU if it would be the result of a complementary interpretation of the contract by the national courts taking into account the interests and intentions of the contractual parties according to section 139 BGB.[19] This approach seems justified, as it is in line with the principle of proportionality.[20] Furthermore, as mentioned in the previous section, automatic nullity according to Article 101(2) TFEU only applies to those parts of the agreement affected by the prohibition, whereas national law has to determine the effects of the nullity for the contractual relations.[21] This seems to suggest that an adjustment or reduction of the agreement should be decided as a matter of national law. In sum, in German law the intention of the contractual parties represents an essential element for the national court to interpret a contract and to determine its validity.

In contrast, in the United Kingdom traditionally a more formalistic approach applied. English courts have generally authorised severance of invalid contractual clauses[22] if, among other conditions, they could be deleted according to the 'blue pencil' doctrine without changing the remaining wording and if the central character of the contract was maintained.

For example, in an employment case, *Beckett Investment v Hall*, the Court of Appeal mentioned three conditions that needed to be fulfilled for a contract to remain valid after the removal of an unenforceable clause:

> (1) the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
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> (2) the remaining terms continue to be supported by adequate consideration;
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> (3) the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all'.[23]

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[16] For example, see Juzgado de lo Mercantil no 5 de Madrid, 15.04.2005, *Estación de Servicio Aloyas, SL v Repsol Comercial de Productos Petrolíferos, SA*, Case 1/04; see P IBÁÑEZ COLOMO, 'A Spanish Court Finds a Distribution Agreement to be Null and Void Pursuant to Art. 81.2 EC and Decides that the Claimant is Not Entitled to Recover the Sums Paid by Virtue of the Contract (*Aloyas/Repsol*)', e-Competitions, No 320, 15.04.2005; for a comparison between Member States see also A LAMADRID DE PABLO and L ORTIZ BLANCO, above n 3.

[17] See eg, FJ SÄCKER and J JAECKS, *Münchener Kommentar zum Europäischen Wettbewerbsrecht*, 2 Aufl Bd 1, CH Beck, 2015, AEUV Art 101, para 648 et seq; see also K SCHMIDT in U IMMENGA and EJ MESTMÄCKER (eds), *EU-Wettbewerbsrecht*, 5th ed, CH Beck, 2012, AEUV Art 101, notes 21–29.

[18] K SCHMIDT, above n 17, para 29.

[19] Ibid.

[20] Ibid.

[21] See also *VAG France v Magne*, where the Court of Justice clarified that national law applies to decide if an 'incompatibility may have the effect of obliging the contracting parties to amend the content of their agreement in order to prevent it from being void': Case C-10/86, *VAG France SA v Établissements Magne SA*, ECLI:EU:C:1986:502, para 15 et seq; see also FJ SÄCKER and J JAECKS, above n 17, para 648 et seq.

[22] R. WHISH and D. BAILEY, *Competition Law*, 7th ed, OUP, Oxford 2012, pp 322–23; see also *Chitty on Contracts*, Sweet and Maxwell, 30th ed, 2008, ch 16, para 16.194 et seq.

[23] *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 61, para 40.

In *English Welsh and Scottish Railways v E.ON*, the latter conditions were not fulfilled, as the national court found that certain terms of a coal carriage agreement were breaching competition law and brought a fundamental change to the agreement. Therefore, the anti-competitive clauses could not be removed separately, but the whole contract became null and unenforceable.[24]

The comparison shows that national approaches to the severance principle diverge, which can sometimes lead to contradictory outcomes for similar competition law questions. For example, a comparative study by Lamadrid and Ortiz Blanco indicated that conflicting solutions were adopted in the Netherlands and Luxembourg concerning the severability of price-fixing terms in franchise agreements.[25] While the Dutch Court held in *Make it Easy* that the complete franchise agreement was null because of an illegal price fixing provision,[26] the Commercial Court of Luxembourg decided against the voidance of the entire agreement.[27]

This has been criticised by some commentators, who have argued in favour of a more congruous attitude to the effect of Article 101(2) TFEU.[28] Therefore, clearer guidance may be required from the Court of Justice to ensure a consistent approach across Member States in the application of the severance principle in competition law cases.

2.3. AUTOMATIC VOIDANCE AND RETROACTIVE EFFECT

In *Brasserie de Haecht*, the Court of Justice affirmed the automatic voidance of prohibited agreements, and clarified that nullity has a retroactive effect. This case concerned a dispute between a brewery (Brasserie de Haecht SA) and the Wilkin-Janssen couple, and was centred on three purchase agreements under which the Wilkin-Janssens were required to obtain specific drinks exclusively from de Haecht for their café in Belgium.[29] In return, de Haecht promised to provide a loan of furniture and a sum of money. However, when the Wilkin-Janssens bought their drinks from other suppliers, de Haecht brought an action before the Tribunal de Commerce of Liège, arguing that the Wilkin-Janssens breached the exclusive purchase terms of the agreements. In turn, the latter maintained that the agreements infringed Article 85(1) of the EEC Treaty (now Article 101 TFEU) and, as a result, were void. In particular, the agreements should be assessed looking at the broader context, taking into account numerous other supply contracts between brewers and café owners in Belgium, which could distort competition as they might prevent breweries from other Member States entering the market. In order to clarify the interpretation of Article 85 of the EEC Treaty, the Tribunal referred a preliminary question to the Court of Justice, which affirmed essentially that an agreement could not be examined in isolation from the context in relation to the above provision. Therefore, '(t)he existence of similar contracts may be taken into consideration for this objective to the extent to which the general body of contracts of this type is capable of restricting the freedom of trade'.[30]

Subsequently, when the case returned to the national court, Brasserie de Haecht notified the European Commission of a standard brewery contract containing the same clauses as the disputed contracts entered into in the above case.[31] With regard to this notification, de Haecht maintained that, in the absence of a prohibitive decision by the Commission, the contracts in dispute were provisionally valid. Faced with this new development, the Tribunal de Commerce in charge referred this case to the Court of Justice again asking, among other questions, when the nullity of contracts exempted from notification should be deemed to take effect. In this case, the Court held that agreements that infringe Article 101

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[24] *English Welsh and Scottish Railway Ltd v E.ON UK Plc* [2007] EWHC 599 (Comm), [2007] UKCLR 1653.
[25] See the case comparison by A LAMADRID DE PABLO and L ORTIZ BLANCO, above n 3.
[26] Court of First Instance of the Hague, *Make It Easy Gelderland VOF v Make It Easy BV and Make It Easy Reality BV*, Case KG 06/1549, 19.02.2007.
[27] Commercial Court of Luxembourg (Tribunal d'arrrondissement de Luxembourg, Section commerciale, Chambre des urgences), Commercial Judgment 152/91, 26.04.1991,, Case 40112, *Univers du Cuir Belgique et Belgian Comfort Company v Cuir Center Luxembourg and Jean-Marie Talmas*.
[28] See eg, A DI GIO, 'Contract and Restitution Law and the Private Enforcement of EC Competition Law' (2009) 32(2) *World Competitio*n 206.
[29] Case C-23/67, *Brasserie de Haecht*, ECLI:EU:C:1967:54.
[30] Ibid p 415.
[31] Case C-48/72, *Brasserie de Haecht II*, ECLI:EU:C:1973:11.

TFEU are automatically void, and the nullity therefore has a bearing on all the effects, either past or future, of the agreement.[32]

This judgment clarified that nullity on the basis of Article 101(2) can have both *ex lege* and *ex tunc* effects. Nullity has an *ex lege* effect, because agreements are directly void, without requiring the European Commission or national authorities to establish the nullity formally. As a consequence, related decisions by the authorities are only of a declaratory nature.[33] Furthermore, nullity has an *ex tunc* effect, as the Court held that it was of retroactive effect, able to influence past or future outcomes of the agreement.[34]

3. CONTRACTUAL MODIFICATIONS AND TRANSIENT EFFECT OF NULLITY

A modification of the contract by the parties or a change of the circumstances may render an initially void agreement valid, provided that this is permitted under national law. In *CEPSA*, the Court of Justice had to decide if a void contract under competition law could subsequently become valid following the amendment of an infringing clause.[35] The Court found that this was not a matter of EU law and should therefore be decided by the domestic courts applying national law.

Interestingly, the UK case law has shown that nullity can have a transient effect, as it may change in time depending on external factors. This means that a void contract can become valid as a result of a change of circumstance. For example, in *Passmore v Morland*,[36] the English Court of Appeal had to assess if an agreement that was initially prohibited under Article 85(1) (now Article 101(1) TFEU), remained void after the circumstances which had given rise to the prohibition had ceased to exist. Referring to the *Brasserie de Haecht* and *Delimitis* cases, the Court of Appeal held that, in order to examine if an agreement was invalid, one needs to establish the relevant economic facts at the time of the question.[37] In particular, it found that:

> an agreement which is within the prohibition in Article 85(1) at the time when it is entered into, because, in the circumstances prevailing in the relevant market at that time, it does have the effect of preventing, restricting or distorting competition, may, subsequently and as the result of a change in those circumstances, fall outside the prohibition contained in that Article—because, in the changed circumstances, it no longer has that effect.[38]

Therefore, the Court concluded that if as a result of a change of circumstances the prohibition no longer applied between the parties to the agreement, the agreement ceased to be void.[39]

This case clarified that in the United Kingdom, contractual nullity is not absolute but has a temporal dimension too. It can change in time depending on the circumstances, with the effect that an agreement may initially be valid but subsequently become void, or vice versa.[40]

In Germany, according to some scholars the nullity effect of agreements can also change over time and may have an *ex nunc* impact, because Article 101(2) TFEU depends on Article 101(1) TFEU.[41] For example, an agreement may initially

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[32] Ibid; for a longer case analysis see FOW VOGELAAR and D GUY, 'The Second Brasserie de Haecht Case: A Delphic Oracle' (1973) 22(4) *International and Comparative Law Quarterly (ICLQ)* 648.

[33] See also M LORENZ, *An Introduction to EU Competition Law*, CUP, Cambridge 2013, p 115.

[34] Ibid.

[35] Case C-279/06, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, ECLI:EU:C:2008:485, para 75.

[36] *David John Passmore v Morland* [1999] 3 All ER 1005, [1999] 1 CMLR 1129.

[37] See also V ROSE and D BAILEY, above n 9, p 1233 et seq.

[38] *Passmore v Morland*, above n 36, para 27.

[39] Ibid. The principle of transient effect of nullity was later confirmed by the English High Court in *Barett v Inntrepreneur Pub* [2000] ECC 106.

[40] This principle of transient effect seems also to be reflected at the EU level in the Block Exemption Regulation 330/2010 on vertical agreements [2010] OJ L102/1. See also V ROSE and D BAILEY, above n 9, p 1234.

[41] In Germany, scholars have diverging opinions on the transient effect of nullity at the national level: for an overview see K SCHMIDT, above n 17, paras 16 and 17.

be in conformity with Article 101(1) TFEU and only later breach this provision because of a change of circumstance (eg an increase in market share). As a result, the contract would first be valid and only subsequently become void.[42]

However, in the reverse situation, as was the case in *Passmore v Morland,* transient nullity would generally not be permitted according to German case law, as the BGH held in *Abgasreinigungsvorrichtung* that an initially void contract cannot subsequently become valid even if the legal framework has changed, unless the contract is confirmed by the parties (section 141 BGB).[43] This strict approach under German law has been criticised, because it could lead to legal uncertainty and may be problematic in the case of a long-term contract.[44]

If a contract is void, the contractual parties may have to renegotiate their agreement to bring it into conformity with Article 101(2) TFEU. This could require an adjustment of the remaining contract, to avoid a contractual imbalance and to ensure that the contract still works effectively. Sometimes the contractual parties already include a substitution clause in the original contract, which would apply in the case of an infringement of competition law. If the parties agree on an amended version of the contract, it would be valid, provided that the new version complies with Article 101 TFEU.[45]

In the Netherlands, the validity of a contract can vary depending on the circumstances of the case and the particular arrangement.[46] However, Dutch law seems to be less permissive in relation to substitution clauses requiring a later amendment of the contract to avoid its voidance. For example, Hartkamp argues that a contractual clause which requires that the original contract will be changed subsequently if it infringes competition law will be void if the parties must reasonably assume from the beginning that their contract is invalid.

The above indicates that while in the United Kingdom the transient effect of nullity has been confirmed in national case law, in other countries, such as Germany, this issue remains more uncertain and controversial in the literature. This may require some clarification by the courts in particular in what concerns the transient nullity effect of agreements that initially infringe Article 101(1) TFEU, but subsequently comply with competition law due to a change of circumstance or a modification of the contract.

3.1. APPLICATION OF THE CONCEPT OF NULLITY TO ARTICLE 102 TFEU AGREEMENTS

Article 102 TFEU prohibits the abuse by undertakings of a dominant position within the internal market, without including an explicit provision imposing the sanction of nullity for related unlawful agreements. However, in practice, the concept of nullity can also play a role in infringements of Article 102 TFEU, as indicated in the cases below. In the literature, different opinions exist as to whether nullity in relation to infringements of Article 102 should be a matter of Union law or national law.[47] Court of Justice case law seems to suggest that nullity in such a context is determined by national law.

For example, in the *Ahmed Saeed Flugreisen* case, the Court of Justice held that if there has been an abuse of competition infringing Article 86:

> [i]n the absence of action by the Commission ... to put an end to the infringement or impose sanctions, the competent national administrative or judicial authorities must draw the inferences from the applicability of the prohibition and, where appropriate, rule that the agreement in question is void on the basis, in the absence of relevant Community rules, of their national legislation.[48]

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[42] Ibid.

[43] See BGH, 05.07.2005, Az X ZR 14/03 X ZR 14/03, WuW/E DE-R 1537, 1540,*Abgasreinigungsvorrichtung*.

[44] FJ SÄCKER and J JAECKS, above n 17, para 655.

[45] K SCHMIDT, above n 17, para 31 et seq; FJ SÄCKER and J JAECKS, above n 17, para 651 et seq.

[46] For the nullity effect in the Netherlands, see A HARTKAMP, *European Law and National Private Law: Effect of EU Law and Human Rights Law on Legal Relationships between Individuals*, Kluwer, The Hague 2012, para 46 et seq.

[47] See eg. A. DI GIO, above n 28, p 213; see also U BERLITZ, 'The Sanction of Voidance under Art 82 EC' in A EZRACHI, *Article 82 EC: Reflections on its Recent Evolution*, Hart Publishing, Oxford 2009, p 187 et seq.

[48] See Case C-66/86, *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v Zentrale zur Bekämpfung des Unlauteren Wettbewerbs eV*, ECLI:EU:C:1989:140, para 45.

In the United Kingdom, a relevant case is *English Welsh and Scottish Railways v E.ON*,[49] which concerned a dispute between a rail freight company (EWS) and an electricity generator (E.ON), on the validity of a coal carriage agreement. Both parties had entered into an agreement containing exclusionary terms according to which the latter had in general to use EWS to carry all of its coal on particular routes. After a number of complaints by other rail freight companies, the rail regulator asked EWS to delete or modify specific contractual clauses, to remove their exclusionary effect. The regulator found that EWS was abusing its dominant position for the supply of coal to UK users, foreclosing the market to competitors, which breached Article 82 EC (now Article 102 TFEU) and the national Competition Act 1998. However, EWS and E.ON did not manage to find replacement terms to remove the exclusionary effect. Therefore, EWS requested that the whole contract be declared void, as the specific contractual terms could not be severed from the agreement. The national court decided that the coal carriage agreement was entirely void and unenforceable, because the agreements contained terms that represented an abuse of a dominant market position and the separation of those terms would have caused the contract to be fundamentally different from the agreement intended by the parties when they entered into the contract.

Under German law, an unlawful agreement infringing Article 102 TFEU would generally also be invalid according to section 134 BGB. This provision expressly states that a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion. As a result, an agreement contrary to Article 102 TFEU would usually be void. However, different to Article 101(2), the nullity effect under section 134 BGBis not automatic, but its application rather depends on the particular objective of the infringed provision.[50]

The above shows that although the concept of nullity is not explicitly included in Article 102 TFEU the effect can be similar to the voidance provided under Article 101 TFEU in case of an unlawful agreement.[51] As a consequence, if there is an abuse of dominance by a company the resulting unlawful contracts or the severable contractual terms can be declared void or unenforceable.

3.2. *ERGA OMNES* EFFECT AND IMPACT ON THIRD PARTY AGREEMENTS

A central question to consider with regard to anti-competitive agreements is the effect they can have on resulting third party agreements. In particular, if an unlawful agreement is declared void on the basis of Article 101(2) TFEU, how does this affect the validity of related contracts agreed with third parties?[52] Although this question is essential it lacks comprehensive examination and remains uncertain in practice.[53] Different laws can influence the effect on third party agreements, ranging from EU and national competition law to contract law, which may lead to diverging outcomes depending on the national system.[54]

A key case dealing generally with this issue is *Béguelin Import*, where the Court of Justice highlighted the *erga omnes* effect that nullity can have on contracting parties and third parties under Community law. The Court held that '(s)ince

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[49] *English Welsh and Scottish Railway Ltd v E.ON UK Plc*, above n 24.

[50] T EILMANSBERGER and F BIEN, *Münchener Kommentar zum Europäischen Wettbewerbsrecht*, 2 Aufl Bd 1, CH Beck, 2015, AEUV Art 102, paras 663–64.

[51] For a detailed analysis see U BERLITZ, above n 47, p 187 et seq; see also A JONES and BE SUFRIN, *EC Competition Law: Text, Cases and Materials*, OUP, Oxford 2008, p 1324 et seq.

[52] Anti-competitive horizontal agreements will often be followed by a number of vertical agreements. For example, if an unlawful agreement breaching Art 101(1) TFEU was a horizontal agreement between suppliers to fix prices to be charged to customers and the resulting higher price is included in a vertical supply agreement, would Art 101(2) apply to this third party arrangement? For more see V ROSE and D BAILEY, above n 9, p 1234 et seq. For the English law approach see *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), paras 394–410.

[53] V ROSE and D BAILEY, above n 9, p 1234 et seq.

[54] See eg, C CAUFFMAN, 'The Impact of Voidness for Infringements of Article 101 TFEU on Related Contracts' (2012) *European Competition Journal (ECJ)* 121 et seq.

the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties'.[55]

At the same time, as seen previously, in *Cement*, the Court found that the effect of such nullity for any orders and deliveries made on the basis of the agreement and the related financial obligations are to be determined by the national courts according to their own laws.[56] This suggests that questions concerning the validity of third party agreements are not a matter for EU law but have to be determined by the laws of the Member States.[57]

The European Commission in turn seemed to follow a different approach in *Astra*, where it held that an infringement of Article 85 EEC (now Article 101 TFEU) 'implies not only the termination of restrictive agreements between the parties, but also the elimination of restrictive effects residing in contracts which have been concluded with third undertakings under the terms'.[58] These latter customer contracts were regarded as perpetuating the restrictive effects resulting from the infringing agreement, as the terms of the customer contracts were determined under conditions of distorted competition. Although the Commission acknowledged that this did not mean that the customer contracts, in themselves, were contrary to Article 85(1) of the Treaty simply because of their links with the restrictive horizontal agreements, the restrictive effects which these contracts perpetuated could only be eliminated when the customers had been given the right of readjustment.[59] Therefore, they should have the option to either remain committed to the customer contracts as signed, to terminate those contracts or renegotiate the terms thereof.

However, subsequently in Atlantic Container Line (TAA) the General Court questioned whether the Commission was entitled to impose such a requirement on parties to a cartel to inform their customers about a right to renegotiate their contractual terms or to terminate the contracts. The Court found in particular that the Commission did not provide sufficient reasoning to explain its decision, and importantly according to case law the consequences in civil law of Article 85(2) (now Article 101(2) TFEU) should be determined by national law.[60]

Thus, while there seemed to be some discrepancy between the approaches suggested by key EU institutions with regard to the legal system to determine the civil law consequences of Article 101(2) TFEU, the Court has now clarified that the validity of third party agreements should be determined by national law. This raises the question of how private law consequences resulting from a breach of Article 101 TFEU have been regulated at the national level and what have been the implications for third party agreements.

3.3. IMPLICATIONS FOR NATIONAL LEGAL SYSTEMS

At the national level, different approaches have been applied by the courts to examine the validity of third party agreements. In general, there seems to be a tendency to regard third party agreements as valid although they are linked to anti-competitive agreements.[61]

For example in German law, contracts with third parties which result from an anti-competitive agreement (*Folgeverträge*) remain generally valid.[62] This is even the case when the third party contract was the objective of the anti-competitive practice or if the third party knew of the prohibited act.[63] However, a third party agreement would be void if it infringed Article 101(1) TFEU per se or if other contractual nullity reasons applied according to the German Civil Code.

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[55] Case C-22-71, *Béguelin Import Co v SAGL Import Export*, ECLI:EU:C:1971:113, para 29.

[56] Case C-319/82, *Société de Vente de Ciments et Bétons de l'Est SA v Kerpen & Kerpen GmbH & Co KG*, above n 13.

[57] See FJ SÄCKER and J JAECKS, above n 17, para 669.

[58] Commission Decision 93/50/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.745 *Astra*) [1993] OJ L20/23–39, 28.1.1993.

[59] Ibid.

[60] Case T-395/94, *Atlantic Container Line AB and others v Commission*, ECLI:EU:T:2002:49, paras 410–18. See also Case C-453/99, *Courage v Crehan*, above n 2, para 29.

[61] A LAMADRID DE PABLO and L ORTIZ BLANCO, above n 3.

[62] FJ SÄCKER and J JAECKS, above n 17, para 669; see also K SCHMIDT, above n 17, para 36.

[63] OLG Celle WuW/OLG 559, 560 et seq,*Brückenbauwerk*; K SCHMIDT in U IMMENGA and EJ MESTMÄCKER (eds), *EU-Wettbewerbsrecht*, 5th ed, CH Beck, 2012, AEUV Art 101(2), para 36.

This would for example be the case if a legal transaction is contrary to public policy or in a case of usury according to section 138 BGB.[64] Thus, in general, German law aims to provide robust protection for third parties from the legal uncertainties related to the nullity effect, unless the third party agreement violates Article 101(1) TFEU per se. Traditionally, the prevailing view in Germany was that third parties are only indirectly affected by an infringement (section 823(2) BGB) and should therefore not be entitled to claim damages.[65] However, this approach changed after the *Courage v Crehan* and *Manfredi* cases, which clarified that parties to third party contracts can also claim damages in case of an infringement of Article 101(1) TFEU.

In English law, there does not seem to be a principle which requires that vertical supply contracts are void when the supplier under that contract was a party to a horizontal price-fixing agreement which was invalid. In *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd*,[66] the English High Court had to assess the scope of Article 81(2) (now Article 101(2) TFEU) and its potential effect on vertical agreements. The Court found that Article 101(2) applied to the unlawful horizontal agreement but there was no indication that the same effect would apply for vertical supply agreements. Referring to the *Cement* case, it held that the latter had to be decided according to English law, where no principles exist that would impose the nullity of such agreements. This is justified, as the nullity of vertical agreements could lead to negative effects for consumers, who might wish to rely on the supply contract to claim damages in case of a breach of contract. According to the Court:

> If the consumer under the vertical agreement wishes to complain that the price charged by the price fixer was excessive then the consumer will have a claim for damages for breach of Article 81. It is not necessary, in order to protect the position of the consumer, for the law to enable the consumer to say that the contract was from the outset void.[67]

On the contrary, contractual voidance could be negative for the position of the consumer.[68]

Thus, third party agreements usually remain valid, in particular if these agreements concern consumer related transactions.

In Sweden, the national Supreme Court in the *Boliden Mineral* case also had to decide on the validity of third party agreements. Similar to previous cases it found that a related agreement is generally only invalid if it breaches competition law in itself.[69] However, in specific circumstances, where there is an important link between the subsequent contract and the original unlawful contract, there might be a public interest reason in protecting competition law, which also results in the related agreement becoming invalid.[70]

The previous cases seem to suggest that third party agreements are generally regarded as valid by the above Member States' courts. However, the exceptions to this principle vary depending on the jurisdiction and the particular circumstances of the case.

Besides competition law, national contract law might also play a significant role in determining the validity of follow-on contracts of prohibited agreements. A comparative study in particular by Cauffman suggests that this is a complex issue.[71]

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[64] K SCHMIDT, above n 17, para 36.

[65] See FJ SÄCKER and J JAECKS, above n 17, para 696.

[66] *Bookmakers' Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd* [2008] EWHC 1978 (Ch), paras 394–410.

[67] Ibid.

[68] However, at the same time the Court specified that in particular cases a third party agreement may be void 'where the parties to the offending agreement are not confined to the horizontal parties but include someone who takes a supply from those horizontal parties. If the facts of a particular case led to that conclusion then both the horizontal parties and the person taking the supply from one of them could be held to be party to an agreement and, if that agreement infringed Article 81(1), then that agreement is void under Article 81(2). In such a case, the consequence would be that the party taking a supply from the horizontal parties would not acquire rights under the offending agreement (or the offending part of it)'. Ibid.

[69] *Boliden Mineral AB v Birka Värme Stockholm AB*, Case NJA 2004 S.804, Judgment of 23.12.2004; mentioned in V ROSE and D BAILEY, above n 9, p 1235.

[70] *Boliden Mineral AB v Birka Värme Stockholm AB*, above n 69.

[71] See C CAUFFMAN, above n 54, p 95 et seq; see also A HARTKAMP, above n 46, p 46 et seq.

While contracts that infringe public order or good morals are usually unlawful or partially void, it remains unclear if third party agreements, which are based on anti-competitive contracts, are contrary to public order.[72] For example, the Belgian and French Codes do not contain particular rules on linked contracts. In general, and similar to the cases above, the fact that an agreement is a follow-up contract to a prohibited agreement does not seem to be sufficient to declare it void. However, if a linked agreement is itself affected on grounds of nullity, because it breaches a mandatory provision, then it can be declared void.[73] Cauffman argues that in France and Belgium an agreement is voidable when its subject matter or cause is unlawful. The latter depends on the determining motives of the parties. In French law, the courts have some freedom to determine the cause of contract, but it is generally regarded as unlawful if it breaches mandatory provisions, good morals or public order. For example, in order to assess whether a contract related to an anti-competitive agreement is prohibited by Article 101 TFEU, the French court might assess if the motive of one party was to achieve higher prices. However, such a motive could only be regarded as a cause for nullity if it was determinative, which means that the contracting parties would not have entered into the contract without the specific reason.[74]

In England, an agreement is usually void if it is contrary to a legal provision or to public order, even if the parties were unaware of the prohibition and did not wish to breach the law. However, if only one person was unaware of the unlawful nature of the contract, he or she may be able to bring an action for misrepresentation or fraud in certain circumstances.[75] As Articles 101 and 102 TFEU have been recognised as fundamental provisions of EU law, and as a matter of public policy by the Court of Justice in the *Eco Swiss* case, these Articles are likely to be regarded as mandatory.[76] Therefore, a third party contract that is contrary to these provisions would be void and unenforceable.

In conclusion, and as seen in previous cases, the Court of Justice has recognised Article 101 TFEU as being of fundamental importance. At the same time, after the *Cement* case various solutions were applied by national courts to determine the effects of void agreements, in particular on third party contracts. While there seem to be some common trends in the assessed countries, the approaches generally differ and sometimes result in conflicting solutions, creating an unclear situation within the EU. Therefore, the Court may have to play a more important role in providing guidance to Member States on the effects of third party agreements that are related to unlawful anti-competitive agreements.[77]

4. PERSONS ENTITLED TO INVOKE ARTICLE 101 TFEU AND THE RIGHT TO DAMAGES

This section examines the question of who is entitled to invoke Article 101 TFEU and the right to damages by victims of infringement of EU competition rules. These topics, which are a facet of the interaction between EU competition and contract law, illustrate how EU regulation and policy may affect national law and are considered here from an English and Italian law perspective.

With this aim, this section analyses the seminal *Courage* case, in which the Court of Justice went further than in previous judgments regarding Article 101 TFEU, by holding that any individual can invoke contractual nullity for breach of competition law, and by recognising the right to claim damages. This case, and subsequent judgments such as *Manfredi*, had a profound impact at the EU and at the national level, stimulating private litigation debates and culminating in new legislative acts to strengthen effective redress. While the implications of this case law for the right to damages has been discussed extensively at the EU level, its impact on contract law and tensions that may result between different legal systems received little attention.[78]

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[72] C CAUFFMAN, above n 54, p 108 et seq. See eg, J BEATSON, A BURROWS and J CARTWRIGHT, *Anson's Law of Contract*, OUP, Oxford 2010, p 396 et seq.

[73] C CAUFFMAN, above n 54, p 106 et seq.

[74] See J GHESTIN, *Traité élémentaire de droit civil. La formation du contrat*, LGDJ, 1993, p 825 et seq, referred to in C CAUFFMAN, above n 54, p 106 et seq.

[75] J BEATSON, A BURROWS and J CARTWRIGHT, above n 72, p 396 et seq; see also C CAUFFMAN, above n 54, p 108.

[76] Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, ECLI:EU:C:1999:269.

[77] C CAUFFMAN, above n 54; A LAMADRID DE PABLO and L ORTIZ BLANCO, above n 3.

[78] See eg, K. CSERES, above n 1, p 205 et seq; see also N REICH, 'The "Courage" Doctrine: Encouraging or Discouraging

4.1. *COURAGE*

The *Courage* case concerned a dispute between Courage (a brewery and supplier of beer) and Mr Crehan (the tenant of a public house) regarding a vertical agreement containing an exclusive purchase obligation.[79] The background facts were, however, more complicated, as the former parties were linked by the agreement with a third party: a company called Inntrepreneur Estates (IEL), which was owned by Courage and by another company called Grand Metropolitan. Courage and Grand Metropolitan had merged their public houses and had transferred them to IEL. Subsequently, IEL and Courage had signed a separate agreement that obliged all tenants of IEL, according to a standard form lease agreement, to purchase their beer exclusively from Courage (beer tie) at a pre-established price. As a result, when IEL concluded a 20-year lease agreement with Mr Crehan, this obliged the latter to buy beer from Courage at a fixed price.

However, subsequently Crehan refused to pay for their deliveries of beer, maintaining essentially that Courage had been selling its beer to other costumers at significantly lower prices than those he had to pay under the beer tie, which reduced his profitability and drove him out of business.[80] As a consequence, Courage brought an action for the recovery from Crehan of payments for unpaid deliveries. In turn, Crehan argued that the beer tie was invalid, because it infringed Article 85 of the Treaty (now Article 101 TFEU) and brought a counterclaim for damages.

When the English Court of Appeal referred the case to the Court of Justice for a preliminary ruling, two points seemed particularly relevant. First, in a previous case the English court had held that Article 101(1) TFEU was not aimed at protecting parties to the illegal agreement, because they were the reason for the anti-competitive outcome, but rather to protect third party competitors. Secondly, in English law a strict approach to the illegality rule applied, according to which a party to a prohibited agreement was not permitted to claim damages from the other party. However, given the supremacy of EU law, the English Court of Appeal asked the Court whether a party to a prohibited agreement could rely on Article 81(1) EC (now Article 101 TFEU) to receive damages from the other contracting party.

Advocate General Mischo found the strict approach to the illegality rule in English law too formalistic.[81] While recognising that Article 101 TFEU was mainly designed to protect consumers and competitors and that 'a party may not profit from its own wrong', he held that a party should benefit from protection when it does not bear significant responsibility for the distortion of competition. In this case, the less responsible party would be closer to being a third party than author of the unlawful agreement. This would be the case, for example, if a party could not resist the economic pressure by a more powerful company and therefore had to agree to a contract, without being genuinely free to choose its terms. The 'responsibility to be borne is clearly significant if that party is *in pari delicto* in relation to the other party, that is to say if it is equally responsible for the distortion of competition', but different conclusions are reached when the party is in a 'markedly weaker position than his co-contractor'. Furthermore, Advocate General Mischo provided some suggestions on how to examine the responsibility of the party that claims damages.[82]

The Court of Justice generally followed Advocate General Mischo's Opinion, adding as a further important point in its reasoning the effectiveness of competition law. As in previous cases, the Court held that Article 85 of the Treaty (now Article 101 TFEU) constitutes a fundamental provision that is central to the workings of the internal market.[83] Furthermore, this provision can have direct effect in the relations between individuals and creates rights for individuals, which Member States' courts have to protect. As a result, anyone can rely directly on this provision to invoke the nullity of the contract, even including a party to the anti-competitive contract.[84]

Compensation for Antitrust Injuries?' (2005) 42 *Common Market Law Review (CML Rev)* 35; see also A JONES and BE SUFRIN, above n 51, p 1111 et seq; see also S DRAKE, 'Scope of *Courage* and the Principle of "Individual Liability" for Damages: Further Development of the Principle of Effective Judicial Protection by the Court of Justice' (2006) 31(6) *European Law Review (EL Rev*) 841.

[79] Case C-453/99, *Courage v Crehan,* above n 2.

[80] A key point advanced by Crehan was based on the *Delimitis* case, arguing that the combined effect of the restrictions included in all the leases caused together the infringement of Art 85 EC (now Art 101 TFEU).

[81] Opinion of Advocate General Mischo in Case C-453/99, *Courage Ltd v Crehan*, 22.03.2001, ECLI:EU:C:2001:181.

[82] Ibid.

[83] Case C-453/99, *Courage v Crehan*, above n 2; see also Case C-126/97, *Eco Swiss*, above n 76, para 36.

[84] Case C-453/99, *Courage v Crehan*, above n 2, paras 19–24.

In relation to the right to damages, the Court of Justice highlighted the importance of effectiveness by stating that 'the practical effect of the prohibition laid down in Article 85(1) [now Article 101 TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition'.[85] This implies that national law should not prohibit such action 'on the sole ground that the claimant is a party to that contract'. In accordance with previous case law, Member States' courts have to ensure that EU law is effectively applied and individual rights are protected at the national level.[86] Damages actions before national courts represent an important element in strengthening EU competition law and discouraging anti-competitive practices. Therefore, such actions should not be completely prohibited to the party to an anti-competitive agreement.

However, at the same time, the Court found that Member States' laws can exclude the right to obtain damages if a party is significantly responsible for the distortion of competition, as in such cases the party should not benefit from unlawful practices.[87] In line with previous case law, Member States have to establish the procedural rules for the rights that individuals derive from Community law, which need to comply with two key EU principles: the principle of equivalence (which requires that the former procedural rules should not be less favourable than those governing similar domestic actions) and the principle of effectiveness (which requires that national rules should 'not render practically impossible or excessively difficult the exercise of rights conferred by Community law').[88] Thus, the Court affirmed the principle of national procedural autonomy as long as the EU principles of equivalence and effectiveness are respected.

Generally echoing Advocate General Mischo, the Court stated that, to determine if a party bears a significant responsibility for an anti-competitive agreement, attention should be placed on 'the economic and legal context in which the parties find themselves' and on 'the respective bargaining power and conduct of the two parties to the contract'.[89] In particular, Member States' courts should assess whether the contractual party claiming damages was in a 'markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him'.[90]

Previous Court of Justice cases, such as *Brasserie de Haecht*[91] and *Delimitis*,[92] provide examples where the contracting parties could not be regarded as being significantly responsible for an infringement of Article 101 TFEU, because of their weaker position. Typically, the other (stronger) party was in control of a commercial distribution network, imposing take-or-leave contracts on smaller retailers, thus causing a cumulative detrimental effect on competition.[93]

In conclusion, the *Courage* case was significant as it recognised the right to compensation where there is an infringement of Article 101 TFEU, which cannot be barred by national law based on the sole reason that a claimant is party to the prohibited contract. As an implication of the ruling, anyone can invoke Article 101 TFEU and may even claim damages on these grounds under certain conditions. In particular, as discussed previously, the Court held that weaker contractual parties can rely on Article 101 TFEU to claim damages in certain circumstances, thereby creating an important precedent for other private parties to apply this provision in similar situations. However, as will be discussed later, the action for damages by Crehan was subsequently unsuccessful at the national level, creating an uncertain legal situation for individuals who wish to invoke Article 101 TFEU.

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[85] Ibid paras 26–27.
[86] See eg, Case C-106/77, *Simmenthal*, ECLI:EU:C:1978:49, para 16, and Case C-213/89, *Factortame*, ECLI:EU:C:1990:257, para 19.
[87] Case C-453/99, *Courage v Crehan*, above n 2, paras 30–31. See also Case C-39/72, *Commission v Italy* [1973] ECR 101, para 10.
[88] Case C-453/99, *Courage v Crehan*, above n 2, paras 30–31. See also Case C-39/72, *Commission v Italy*, above n 87, para 29.
[89] Case C-453/99, *Courage v Crehan*, above n 2, para 32.
[90] Ibid para 33.
[91] Case C-23/67, *Brasserie de Haecht*, above n 29.
[92] Case C-234/89, *Delimitis*, above n 5.
[93] Case C-453/99, *Courage v Crehan*, above n 2, para 34.

As a result, the *Courage* ruling was intensively debated,[94] in particular in the United Kingdom,[95] where the case originated and interfered with established law principles. The next sections will analyse the impact this judgment had on English law, assessing its application by the national courts and the related uncertainties and limitations.

4.2. IMPACT OF THE RULING ON ENGLISH LAW

While the Court of Justice focused on the competition law aspects, the private law implications of the *Courage* case were also relevant, as the decision established an important precedent for private enforcement cases. Furthermore, this ruling revealed important tensions between EU competition law, on the one hand, and national and private law principles, on the other.

At first sight, the idea that unlawful agreements should be declared void seems not unusual from a private law perspective, given the negative consequences they can have on the legal system.[96] However, providing a party to an unlawful contract with particular protection under Article 101 TFEU, even recognising the right to claim damages, is more far-reaching and has raised criticism because of its interference with commonly held private law principles. For example, such decision may conflict with the principle of private autonomy, according to which the parties should be allowed to determine their relationship independently from state intervention,[97] and with *pacta sunt servanda*,[98] which requires that an agreement should be honoured and complied with within the boundaries of mandatory law.

On the other hand, as previously seen, the Court of Justice applied a differentiated approach in its reasoning, taking into account the imbalances in bargaining power of the parties involved in the anti-competitive contract, which can effectively constrain the autonomy of the weaker party in determining the terms of the contract. The concept of the weaker contractual party requiring particular protection in the market is already well established in private law, in particular in the field of consumer law. From this perspective, limiting the responsibility of the weaker contractual party may be regarded as justified, where the bargaining power of the economically weaker parties is considerably restricted, limiting the contractual autonomy of the latter.[99]

Another principle affected by *Courage* is that of *in pari delicto* in English law, according to which the court cannot support a party on the basis of a prohibited act. As mentioned previously, the English Court of Appeal in *Gibbs Mew Plc* affirmed the application of the *in pari delicto* principle, holding that 'English law does not allow a party to an illegal agreement to claim damages from the other party for loss caused to him by being a party to the illegal agreement.'[100] A different conclusion was instead reached subsequently by the Court of Justice in *Courage*, as the Court limited the liability of the weaker contractual party to an anti-competitive agreement under certain conditions mentioned above.

A possible explanation for this divergence is the difference in focus that exists between national and EU courts. National courts, traditionally charged with the responsibility for preserving private law principles, may be more inclined to defend the view that contractual obligations should be maintained and a party to an illegal contract should not profit from the protection that Article 101 TFEU provides following the logic embedded in the *in pari delicto* principle. The

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[94] See N REICH, above n 78, pp 35–66; see also A JONES and BE SUFRIN, above n 51, p 1111 et seq; see also S. DRAKE, above n 78, pp 841–64.

[95] See G MONTI, 'Anti-competitive Agreements: The Innocent Party's Right to Damages' (2002) 3 *European Law Review (EL Rev)* 282; O. ODUDU, above n 96, p 396 et seq.

[96] See eg, s 134 German BGB, which expressly states that a legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.

[97] See eg, S WEATHERILL, 'The Elusive Character of Private Autonomy in EU Law' in D. LECZYKIEWICZ and S. WEATHERILL, *The Involvement of EU Law in Private Law Relationships*, Hart Publishing, Oxford 2013, p 9 et seq and D LECZYKIEWICZ and S WEATHERILL, 'Private Law Relationships and EU Law' in ibid p 2 et seq.

[98] See eg, R WHISH and D BAILEY, above n 22.

[99] The application of this concept in relation to Art 101 TFEU can be regarded as a sign of convergences between competition and private law, albeit it is used in different contexts and with different implications. See eg, A ALBORS-LLORENS, 'Competition and Consumer Law in the European Union: Evolution and Convergence' (2014) 33 *Yearbook of European Law (YEL)* 163.

[100] *Gibbs Mew Plc v Graham Gemmell* [1999] ECC 97, CA, 22.07.1998.

Court of Justice instead, was established to ensure that EU law is properly applied in the Member States, naturally giving prevalence to key principles such as effectiveness supporting these Community aims. For example, in *Courage* the Court stressed that the effectiveness of competition law would be put at risk, if damages claims were not available to anyone. In particular, it held that:

> the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.[101]

Therefore, according to this approach, national law principles may sometimes be sacrificed in the interests of market competition. Contrary to the English *pari delicto* principle, the Court held that 'anyone' could claim damages, unless they are significantly responsible for the breach.

This approach has resulted in some criticism. Although the *Courage* ruling aimed to improve the effectiveness of competition law, in practice it may have some negative consequences, which the Court did not take into consideration. As some have argued, as an effect of this case law market actors may be less inclined to comply with competition law.[102]

This may also lead to settlements of unmeritorious claims in cases concerning Article 101 TFEU of parties that attempt to strategically avoid their contractual obligations.[103] Empirical research on competition litigation settlements in the United Kingdom from 2000 to 2005 seems to suggest that out of court settlements have grown in this area whereas there has been only a limited increase of competition law litigation before the courts.[104]

Taking this into account, national courts may be reluctant to admit Article 101 TFEU arguments to avoid contractual obligations in the United Kingdom.[105] For example, Odudu argued that the English courts have used different strategies to mitigate negative effects related to this defence, by making its application more difficult in practice and reducing the advantage that a party could obtain from raising it.[106]

An assessment of the follow-up decisions of the English courts after *Courage* seems to reflect a limited effect of Article 101 TFEU at national level. When the case returned to the English court of first instance after the Court of Justice referral, the national judge decided that the agreement between the parties was lawful and as a result no damages were awarded. In contrast, the Court of Appeal found that the agreement was in breach of competition law, basing its reasoning on the *Whitbread* case, where the judges had decided that similar agreements were void. However, this ruling was eventually overturned by the House of Lords, which confirmed the first decision by the English court. The House of Lords held that English courts were not obliged to follow the decision of the European Commission in similar cases.[107] As a result, mainly for procedural and policy reasons, the Euro-defence had eventually limited effect at the national level in the *Courage* case.[108]

This ruling has been criticised by commentators, who argued in favour of more private law enforcement to enhance effective competition law.[109] On the other hand, following the Commission's decision would have meant granting less procedural autonomy at the national level. A review of subsequent English case law where Article 101 TFEU has been

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[101] Case C-453/99, *Courage v Crehan,* above n 2, para 27.
[102] See G MONTI, above n 95, pp 282–302.
[103] O ODUDU, above n 95, p 396 et seq.
[104] BJ RODGER, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the United Kingdom, 2000–2005' (2008) *European Competition Law Review (ECL Rev).*
[105] See more in R WHISH and D BAILEY, above n 22, p 321 et seq.
[106] O ODUDU, above n 95, p 396 et seq.
[107] *Courage Ltd v Crehan* [2006] UKHL 38, HL; see also the assessment in G MONTI, *EC Competition Law*, CUP, Cambridge 2007.
[108] See A KOMNINOS, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, Hart Publishing, Oxford 2008.
[109] See eg A ANDREANGELI, 'The Enforcement of Article 81 EC before National Courts after the House of Lords' Decision in *Inntrepreneur Pub Co Ltd v Crehan*' (2007) 32 *European Law Review (EL Rev)*262.

used as a shield shows that national judges are generally reluctant to declare a contract void, as only in a few cases was this defence successful.[110]

Given the remaining uncertainties surrounding private actions for damages in competition law claims, alternative private law remedies could become more relevant, depending on the particular facts of the case. For example, a party could build a case on the potential misrepresentation of the competitiveness of the prices in an exclusive purchase agreement. Another possible private law remedy could be based on the tort of intimidation, if one party had been forced to act to his own disadvantage by an illegal act of the other party.[111] A successful claim may then lead to restitution, which has so far received little attention as an alternative to damages actions at the EU policy level.[112]

In conclusion, the English example shows that, although contractual nullity and the right to damages have been recognised at EU level, national courts keep significant power to determine if Article 101 TFEU claims are to be successful, because of the principle of national procedural autonomy.[113] This makes the application of Article 101 TFEU more difficult in practice at the national level. As a result, alternative dispute resolution mechanisms and private law remedies may have an important role in private enforcement, despite the relatively scant attention they have received in the literature.[114] At the same time, while the Court of Justice has confirmed and clarified the concept of damages in the more recent case law discussed below, the EU has recently adopted a new Directive on damages actions, which is likely to facilitate recourse to these legal instruments in the future.

4.3. *MANFREDI* AND THE RIGHT OF THIRD PARTIES TO CLAIM DAMAGES

As seen above in *Courage*, the Court of Justice recognised the right to damages stemming from Article 101 TFEU. More recently in *Manfredi*,[115] the Court confirmed the *Courage* ruling and provided indications on the right of third parties to claim such damages, as well as an assessment of the amount of damages. Similar to *Courage* it concerned the right of damages for an infringement of Article 81, and affected multiple parties. However, while in *Courage* the party that invoked compensation was directly part of the anti-competitive agreement, in *Manfredi* the action for damages was brought by third party consumers against a number of insurance companies, requesting a refund of the premium increases that they had paid. These cases were brought after the Italian competition authority had found that the insurance companies were guilty of anti-competitive practices. The Italian judge in charge requested a reference for a preliminary ruling on the interpretation of Article 81 EC, asking in particular whether third parties who have a relevant legal interest can rely on the invalidity of an agreement or practice prohibited by that Community provision and claim damages for the harm suffered where there is a causal relationship between the agreement or concerted practice and the harm suffered.

Advocate General Geelhoed underlined in his Opinion the essential role that private enforcement could play in competition law. Regarding the question of whether third parties may rely on Article 81 (now Article 101 TFEU), he distinguished between the civil law effect arising directly from the Treaty (such as the voidance of contract), and other civil law consequences (such as damages). In relation to the former civil law consequences, he confirmed that Article 81 EC has direct effect in the relations between individuals and the invalidity of a contract according to this provision is absolute. As a result, it may be relied on by anyone, including third parties.[116] With regard to the latter civil law consequences, he affirmed that third parties should also be allowed to bring damages actions, because according to

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[110] See more in R WHISH and D BAILEY, above n 22, p 321 et seq.
[111] See G MONTI, above n 95, pp 282–302.
[112] See eg, A DI GIO, above . 28, p 199 et seq.
[113] See N REICH, above n 78; see also A JONES and BE SUFRIN, above n 51, p 1111 et seq.
[114] See the empirical studies in the United Kingdom and Germany: BJ RODGER, above n 104; for Germany see S PEYER, *Myths and Untold Stories: Private Antitrust Enforcement in Germany*, CCP Working Paper 10-12, 07.2010.
[115] Case C-295/04, *Manfredi,* ECLI:EU:C:2006:461.
[116] Opinion of Advocate General Geelhoed in Case C-295/04, *Manfredi v Lloyd Adriatico Assicurazione Spa and others,* ECLI:EU:C:2006:67, 26.01.2006, para 54.

Courage this could strengthen the functioning of EU competition law and discourage anti-competitive practices, thereby contributing to effective competition in the Community.[117]

The Court of Justice followed this Opinion and confirmed the *Courage* ruling, reiterating that Article 81(1) EC produced direct effects in the relations between individuals, and created rights for the individuals concerned which the national courts must safeguard.[118] Furthermore, it held that to ensure 'the practical effect' of Article 81 EC, this provision must be interpreted as meaning that 'any individual' could rely on the nullity of an agreement and claim damages for the harm suffered, if there was a causal relationship between that harm and an illegal agreement. However, it was for the Member States' laws to determine the exercise of this right and in particular to define the concept of causal relationship, provided that the principles of equivalence and effectiveness were respected.[119]

Therefore, this case affirmed that third parties, such as consumers, could also rely on Article 101 TFEU to claim damages. In addition, it provided some information on the concept of damages, indicating potential differences between parties relying on Article 101 TFEU as to the limitation period and the damages that could be claimed.

On the limitation period, the Court of Justice held that it was for the Member States to determine the relevant procedural rules. However, according to the principles of equivalence and effectiveness, the national rules should not make EU actions more difficult to be brought than actions based on national law and, in particular, they should not make them impossible in practice. Hence, there may be a need for different limitation periods depending on the concerned party. For instance, if a limitation period starts at the time of infringement and is of very short duration, this could make it impossible for third parties, such as consumers, to invoke an EU action, as they may be unaware of the infringement until it is discovered. In contrast, a party to the anti-competitive agreement may have to comply with shorter limitation periods.

A final key question assessed in *Manfredi* concerned the amount of damages that could be awarded to the third party. The national court dealing with the case asked the Court of Justice whether Article 81 EC required national courts to award punitive damages, ie damages greater than the advantage obtained by the infringing companies. The Court held that, here too, the principle of equivalence applied. If it is possible for Member States to impose specific damages (eg punitive damages) in their domestic system for similar actions, then it must also be possible to award such damages actions for an infringement of Community rules. As in *Courage*, the Court stressed the important role of the right to damages for individuals to strengthen EU competition law and as a deterrent to anti-competitive agreements or practices. Importantly, the Court clarified that an injured person must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.

This provided some useful indications at the EU level on the concept and amount of private damages that may be claimed. The latter may, however, differ considerably, depending on the party that brings the claim and on the national system where the case is brought. For example, a third party, such as a consumer or a competitor, who bears no responsibility for the infringement, may claim punitive damages if the national system provides for this option under its national law. In contrast, a party that participated in the illegal competitive agreement is unlikely to be able to claim the same damages, following the principle that nobody should profit from its own illegal behaviour, as mentioned in previous case law. Summing up, while the concept of standing established by the Court of Justice is very broad under Article 101 TFEU, the final outcome of a damages claim also depends on the involvement of the parties in the anti-competitive agreement, their market position and the specific jurisdiction.

4.4. IMPACT OF COURT OF JUSTICE CASE LAW ON ITALIAN LAW

The Court of Justice case law had an important impact on Italian law, affecting particularly the ability of consumers to bring private damages actions for infringements of competition law.[120]

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[117] Ibid paras 56–58.
[118] C-295/04, *Manfredi*, above n 115, para 39.
[119] Ibid paras 63–64.
[120] See eg, LF PACE, 'L'applicazione del diritto antitrust da parte dei giudici nazionali: l'influenza dell' ''armonizzazione

In order to fully understand the effect of EU competition law on the national system, it is useful to briefly assess the Italian competition law framework. Adopted in 1990, the Italian Competition Act is relatively recent, providing new opportunities to fight anti-competitive practices at the national level.[121] However, according to some scholars, the interpretation of this Act was influenced by an 'old fashioned competition culture', which focused on the protection of businesses against anti-competitive practices, without giving consumers a specific role in the private enforcement of competition law.[122] This was reflected in the early case law of the Corte di Cassazione which initially denied the standing of consumers under Italian competition law.[123] However, influenced by the Court of Justice's *Courage* ruling, the national court eventually changed its stance in the 2005 *Unipol* case, clarifying that competition infringement cases could also be brought by consumers.[124]

Subsequently, the Court of Justice case law, in particular *Manfredi,* further influenced the Italian courts in the same direction in at least three respects. First, the Giudice di Pace of Bitonto held in the follow-up judgment to *Manfredi* that consumers should be allowed to bring antitrust damages actions before the courts of first instance, thus facilitating effective protection, as these courts are generally cheaper with speedier procedures than the appeal court.[125] Secondly, the *Manfredi* ruling led to a reconsideration of the prescription period for bringing a case before the national courts. The Court of Justice held that it is for the Member States to determine the limitation period for damages actions, provided the principles of equivalence and effectiveness are respected.[126] In Italy, claims related to competition law were generally subject to a five-year prescription period, starting from the moment the anti-competitive practice was adopted.[127] The *Manfredi* case made it apparent that this term may be too short, clashing with the principle of effectiveness, as anti-competition agreements can remain covert for a long time in certain circumstances.[128] Recognising this, the Corte di Cassazione applied a flexible approach in the interpretation of the Italian law holding that, in damages claims for an infringement of competition law, the prescription period starts only on the day the anti-competitive practice is discovered, giving the claimant more time to lodge an action.[129]

Finally, the Court of Justice case law seems to have influenced the Italian jurisprudence with regard to the proof of the causal link.[130] The Corte di Cassazione held that a causal link could be presumed to exist between the anti-competitive practice and the loss incurred by the victim, as a premium increase was regarded as a normal outcome of such practice.[131] Some scholars saw in this decision an application of the EU law principle of effectiveness, which requires national law not to make the exercise of EU rights excessively difficult. If this is the case, this would be another example of EU jurisprudence stimulating developments at the national level. This would be a crucial development, as proving the causal link in anti-competitive cases has always been difficult in practice and a major obstacle for claimants, despite previous decisions by the Italian Competition Authority which facilitated follow-on actions providing evidential value.

In conclusion, the EU case law had important implications for Italian law, highlighting specific weakness and leading to a change in the interpretation of the law by the national judges. While this has improved the standing of consumers to

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negativa" della Corte di giustizia e l'esperienza italiana', *Studi sull'integrazione europea,* no 2, 2011, anno VI, 482; P NEBBIA, 'So What Happened to Mr Manfredi? The Italian Decision Following the Ruling of the European Court of Justice' (2007) *European Competition Law Review (ECL Rev)* 591; G AFFERNI, 'Case: ECJ –Manfredi v. Lloyd Adriatico' (2007) 3(2) *European Review of Contract Law (ERCL)* 179.

[121] Italian Law No 287 of 10.10.1990 on Defence of Competition and the Market.

[122] See M CARPAGNANO, 'Private Enforcement of Competition Law Arrives in Italy: Analysis of the Judgment of the European Court of Justice in Joined Cases C-295-289/04 Manfredi' (2007) 3(1) *Competition Law Review (CLR)* 47.

[123] Corte di Cassazione, Decision No 17475, 09.12.2002, Foro it 2003.

[124] Corte di Cassazione, Decision No 2207, 04.02.2005; see also G AFFERNI, above n 120, pp 179–90.

[125] Giudice di Pace di Bitonto, Decision No 172/2003, *Manfredi v Lloyd Adriatico*; see also P NEBBIA, above n 120, pp 591–96.

[126] Case C-295/04, *Manfredi*, above n 116, para 81.

[127] G AFFERNI, above n 120, p 188.

[128] Case C-295/04, *Manfredi*, above n 116, para 81.

[129] Corte di Cassazione, Decision No 2305, 02.04.2007.

[130] See LF PACE, above n 120, p 497 et seq.

[131] See ibid; C BIANCHI, 'Tutela aquiliana antitrust, verso un nuovo sottosistema della responsabilitá civile?', *Resp Civ Prev* 2007, 1616.

bring damages actions, challenges still remain in Italy due to intricate competence rules regarding antitrust damages actions,[132] lengthy procedures, and a general lack of clarity regarding quantification of damages.

In order to facilitate dispute resolution for consumers, a new procedural mechanism became available in 2010 in Italy.[133] This new redress tool was introduced by Article 140*bis* of the Italian Consumer Code, which entitles consumers to initiate collective action against an undertaking for a number of infringements, including anti-competitive practices.[134] As a result, consumers can use this mechanism under certain conditions to claim damages if they have suffered a loss as a consequence of an anti-competitive conduct. While it remains to be seen how effective this instrument will be in the long term, it is likely to improve private enforcement of competition law.

At the European Union level, new legislative measures have also recently been introduced to facilitate antitrust damages actions, which are described below.

4.5. NEW LEGISLATIVE DEVELOPMENTS

The *Courage* and *Manfredi* cases have invigorated the debate on the role of private enforcement of competition law as a complement to public enforcement, both in the EU and at the national level.[135] As a result, after a long period of consultation, the EU adopted a Directive on antitrust damages actions in November 2014.[136] This Directive aims to ensure full compensation for harm caused in relation to an infringement of competition law, and to coordinate the enforcement of competition rules by authorities and national courts.[137] Building on concepts that have been developed by the Court of Justice in previous case law, the Directive harmonises a number of key rules on, amongst others: full compensation; legal standing; the passing on defence; the principle of joint and several liability; and consensual dispute resolution.[138] Furthermore, the Directive clarifies some controversial and complex issues, such as the disclosure of evidence and the relationship between public and private enforcement of competition rules.[139] This legislative innovation can be regarded as a positive development, which is likely to facilitate private damages claims for victims of a breach of EU competition law.

However, the new Directive only covers certain areas relevant for actions for damages, ignoring other important aspects of private enforcement of competition law, such as collective redress, the effect of contractual voidance and restitution. This omission is disappointing, as such tools could enhance effective redress in the face of the inconsistencies at the national level seen above, and of the barriers that consumers encounter in enforcing their right to damages.[140]

While the Commission adopted a Recommendation in 2013 inviting Member States to establish collective action mechanisms in their legal systems by July 2015, this is not a binding instrument. Therefore, collective redress for breach

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[132] See eg, M CARPAGNANO, above n 122, pp 47–71.

[133] *Azione di Classe* in Art 140*bis* of the Italian Codice del Consumo; see more in R CAPONI, 'Collective Redress in Europe: Current Developments of "Class Action" Suits in Italy' (2011) 16 *Zeitschrift für Zivilprozess International* 2012.

[134] Article 140*bis* was amended in 2012 to improve the efficiency of the new collective redress mechanism; see R CAPONI, above n 133.

[135] In subsequent judgments the Court provided further clarifications on related issues, eg Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ECLI:EU:C:2011:389. Furthermore, in the literature the right to damages and related concepts, such as the passing on doctrine, have been widely discussed, but cannot be covered in this chapter. Relevant literature can be found in V ROSE and D BAILEY, above n 9, p 1233 et seq; see also R WHISH and D BAILEY, above n 22.

[136] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014 OJ L349/1, 5.12.2014.

[137] Member States will have to implement the Directive within two years.

[138] For further analysis of the Directive see Editorial Comments, '"One Bird in the Hand …" The Directive on Damages Actions for Breach of the Competition Rules' (2014) *Common Market Law Review (CML Rev)* 1333.

[139] Ibid.

[140] See eg, I. BENÖHR, 'Consumer Dispute Resolution after the Lisbon Treaty' (2013) 36 *Journal of Consumer Policy (JCP)* 87.

of EU competition rights still primarily depend on national procedural rules, which have to ensure that the EU principles of effectiveness and equivalence are respected.

Interestingly, the reform of collective redress has gathered momentum in the United Kingdom with the recent introduction of a proposal which, in some respects, is going further than the EU Recommendation. The Consumer Rights Act 2015 incorporated, among others, an opt-out option for collective consumer redress, which was regarded as a more efficient option than an opt-in regime for situations where many consumers each have small claims, as often happens in competition law cases.[141] This new initiative on private enforcement has been particularly inspired by Court of Justice case law (eg by the *Courage* case), recognising effective redress as a fundamental part of a well-functioning competition regime.[142] In contrast, the EU Recommendation suggests the opt-in option as the default solution, mentioning the opt-out option only as an exceptional measure.

In conclusion, the recent legislative developments on damages actions and collective redress have been an important step in facilitating private actions for damages in the EU. Despite covering only specific issues (such as consensual settlement and the amount of compensation), the binding EU Directive on damages actions for competition law infringement is likely to make it easier for victims of anti-competitive practices to obtain compensation. However, the EU measure on collective redress seems less effective in ensuring access to justice for multi-party actions than its UK counterpart because of the soft nature of the instrument, which contrasts with the binding and more far-reaching measure in the United Kingdom. However, despite its innovative Consumer Rights Act 2015, the UK system also remains plagued by a lack of litigation funding, which makes collective redress actions still difficult in practice.

5. CONCLUSIONS

This chapter has discussed the effect that EU competition law is exerting on private law. While both areas of law are independent and usually see the application of different regulatory approaches, the interaction between the two fields has intensified in recent years. Through its case law, the Court of Justice has developed a number of key concepts that have influenced national competition and private law in different ways, primary among these, the concepts of nullity and of damages.

Two aspects of the spillovers from competition into private law have been discussed in detail, focusing on cases that revolved around Article 101 TFEU. First, it has been shown that competition law can automatically invalidate illegal anti-competitive agreements, so that they cannot be enforced between private parties. The Court of Justice has established a number of basic principles applicable to the concept of nullity in competition law cases, among which that of absolute voidance and of retroactive effect. At the same time, however, the practical application and determination of the consequences of nullity has generally been left to Member States. This has resulted in legal uncertainty and sometimes conflicting results in EU countries, particularly with regard to the validity of third party contracts and severance, requiring clearer guidance at the EU level.

Secondly, this chapter has examined how competition law can give rise to private damages claims, as illustrated in *Courage* and *Manfredi*. In these cases, the Court has recognised the right to damages of any parties, also indicating the implications of this concept in national law. At the national level, Article 101 TFEU has been frequently invoked in private litigation as a Euro-defence, with the aim of avoiding contractual obligations and claiming compensation. This trend has been encouraged and sustained by the Court of Justice's broad interpretation of Article 101 TFEU, according to which even parties to an unlawful agreement can invoke nullity and claim a right to damages. However, the increasing influence of EU competition law may come into conflict with long-established private law principles and national law and this, it has been argued, might have an ambiguous effect on competition itself. Faced with such conflicts, UK national courts have generally been reluctant to admit the Euro-defence as a way to avoid contractual duties, thus limiting the effects of Article 101 TFEU.

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[141] Consumer Rights Act 2015.
[142] UK Parliament's explanations to the Consumer Rights Act 2015.

In sum, the convergence of competition and contract law in the EU is far from accomplished, and the intersection between the two fields is fraught with potential conflicts. If harmonisation is to take place in an effective way, the legislator will have to balance different legal principles and objectives carefully, and take account of various national approaches to private law.